

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ALQUANDRE H. TURNER,

Petitioner,

v.

RENEE BAKER,¹ et al.,

Respondents.

Case No. 3:17-cv-00151-HDM-CLB

ORDER

Alquandre H. Turner's 28 U.S.C. § 2254 habeas corpus petition is before the court for the adjudication of the merits of the remaining claims. (ECF No. 38.) Having considered the claims and the parties' arguments, the petition is denied.

I. Procedural History and Background

In April 2006, a jury convicted Turner of first-degree kidnapping with use of a deadly weapon; conspiracy to commit robbery; robbery with use of a deadly weapon; burglary while in possession of a firearm; and sexual assault while in possession of a firearm. (Exhibit 13.)² The charges arose from the December 2005 armed robbery of a florist in Las Vegas, Nevada. The state district court sentenced Turner to terms that amount to 20 years to life in prison. (Exh. 14.) Judgment of conviction was entered on

¹ According to the state corrections department's inmate locator page, Turner is incarcerated at Lovelock Correctional Center. The department's website reflects Nethanjah Breitenbach is the warden for that facility. At the end of this order, the court directs the clerk to substitute Nethanjah Breitenbach for prior respondent Renee Baker, under, *inter alia*, Rule 25(d) of the Federal Rules of Civil Procedure.

² The stipulated joint exhibits are found at ECF Nos. 25-27.

1 June 20, 2006. (Exh. 15.) The Nevada Supreme Court affirmed Turner's convictions in
2 April 2007. (Exh. 29.)

3 Next, Turner submitted a federal habeas petition challenging the same judgment
4 of conviction. (Case no. 3:08-cv-00435-BES-VPC.) In January 2009, the court
5 dismissed the petition without prejudice due to Turner's failure to respond in any way to
6 this court's order directing him to pay the \$5.00 filing fee. (*Id.* at ECF No. 9.) In February
7 2014, Turner's second habeas petition challenging the same judgment of conviction
8 was dismissed with prejudice as untimely, and judgment was entered. (Case no. 3:13-
9 cv-00096-RCJ-WGC, ECF Nos. 10, 11.)

10 In October 2014, the state district court entered an amended judgment of
11 conviction, giving Turner 154-days credit for time served. (Exh. 48.) The Nevada
12 Supreme Court affirmed the denial of Turner's state postconviction habeas corpus
13 petition in June 2015. (Exh. 64.) In April 2017, Turner filed this third federal habeas
14 petition. (ECF No. 5.) Ultimately, this court appointed counsel, and Turner filed a
15 counseled, first-amended petition in April 2022.³ (ECF No. 38.) This court dismissed
16 ground 1 as purely a matter of state law, and therefore, noncognizable in federal
17 habeas corpus. Respondents have now answered the remaining claims, and Turner
18 replied. (ECF Nos. 54, 61.)

19 20 **II. Legal Standards & Analysis**

21
22 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty
23 Act (AEDPA), provides the legal standards for this court's consideration of the petition in
24 this case:

25
26 ³ This court had dismissed the third federal petition earlier as second and successive.
27 Turner appealed, and the Ninth Circuit Court of Appeals held that the amended
28 judgment of conviction awarding Turner credit for time served was a new judgment of
conviction. Thus, the court of appeals deemed the current federal petition a first petition
and remanded it to this court. *Turner v. Baker*, 912 F.3d 1236, 1241 (9th Cir. 2019).

1 An application for a writ of habeas corpus on behalf of a person in
2 custody pursuant to the judgment of a State court shall not be granted with
3 respect to any claim that was adjudicated on the merits in State court
4 proceedings unless the adjudication of the claim —

5 (1) resulted in a decision that was contrary to, or involved an
6 unreasonable application of, clearly established Federal law, as determined
7 by the Supreme Court of the United States; or

8 (2) resulted in a decision that was based on an unreasonable
9 determination of the facts in light of the evidence presented in the State
10 court proceeding.

11 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner
12 applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court
13 convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S.
14 685, 693-694 (2002). This court’s ability to grant a writ is limited to cases where “there is
15 no possibility fair-minded jurists could disagree that the state court’s decision conflicts
16 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
17 Supreme Court has emphasized “that even a strong case for relief does not mean the
18 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538
19 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
20 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating
21 state-court rulings, which demands that state-court decisions be given the benefit of the
22 doubt”) (internal quotation marks and citations omitted).

23 A state court decision is contrary to clearly established Supreme Court
24 precedent, within the meaning of § 2254, “if the state court applies a rule that
25 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state
26 court confronts a set of facts that are materially indistinguishable from a decision of [the
27 Supreme Court] and nevertheless arrives at a result different from [the Supreme
28 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,
405-06 (2000), and citing *Bell*, 535 U.S. at 694).

A state court decision is an unreasonable application of clearly established
Supreme Court precedent, within the meaning of § 2254(d), “if the state court identifies

1 the correct governing legal principle from [the Supreme Court's] decisions but
2 unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538
3 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause
4 requires the state court decision to be more than incorrect or erroneous; the state
5 court's application of clearly established law must be objectively unreasonable. *Id.*
6 (quoting *Williams*, 529 U.S. at 409).

7 To the extent that the state court's factual findings are challenged, the
8 "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas
9 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause requires
10 that the federal courts "must be particularly deferential" to state court factual
11 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
12 state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires
13 substantially more deference:

14 [I]n concluding that a state-court finding is unsupported by substantial
15 evidence in the state-court record, it is not enough that we would reverse in
16 similar circumstances if this were an appeal from a district court decision.
17 Rather, we must be convinced that an appellate panel, applying the normal
standards of appellate review, could not reasonably conclude that the
finding is supported by the record.

18 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393
19 F.3d at 972.

20 Under § 2254(e)(1), state court factual findings are presumed to be correct
21 unless rebutted by clear and convincing evidence. The petitioner bears the burden of
22 proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*,
23 563 U.S. at 181.

III. Trial Testimony⁴

The State subpoenaed Jakarr Dudley, Turner's 15-year-old neighbor. (Exh. 10 at 28-49.) On the day of the robbery, Dudley was hanging out with Turner and Turner's friend A.K., who is Asian. They drove to a shopping center in A.K.'s Honda Civic; Turner and A.K. got out. Dudley stayed in the car and didn't see where they went. They returned a few minutes later and the three drove away. Then A.K. said, "Fuck it, let's do it." (*Id.* at 35.) A.K. asked Dudley to hand them handcuffs and duct tape that were in the trunk. At some point A.K. had taken a gun out of his waistband. Dudley never saw Turner with the gun. They let Dudley out of the car and went back and parked where they had first stopped. Dudley walked across the street to McDonald's; he saw the Honda in the alley behind the shopping center. A.K. and Turner ran out of the back of the store. He told them to wait because he needed a ride. He got back in the car and saw flowers, a purse, and a cellphone. They gave Dudley the phone. He made numerous calls, including to his father, until the phone was shut off two days later. On cross examination, Dudley did not recall any conversation when they first got in the car about going to move some furniture to make some money.

Mikyung Kim testified that she and her husband owned the florist. (Exh. 10 at 50-102.) On December 17, 2005, a very short Asian man and an average-height African American man came into the shop about 3:30 in the afternoon. They asked her about the price for a bouquet of roses. They said they were too expensive and left. They returned about 10 minutes later and said they wanted to buy the flowers. The Asian man went toward the back of the store; Kim went to the cash register. The Asian man returned brandishing a gun. The black man came up to her and put one hand in

⁴ The court makes no credibility findings or other factual findings regarding the truth or falsity of evidence or statements of fact in the state court record. The court summarizes the same solely as background to the issues presented in this case, and it does not summarize all such material. No assertion of fact made in describing statements, testimony, or other evidence in the state court constitutes a finding by this court. Any absence of mention of a specific piece of evidence or category of evidence does not signify the court overlooked it in considering Turner's claims.

1 handcuffs; he told her to open the cash register. She complied and then he pushed her
2 down to her knees and taped her face and feet. He unbuttoned her pants, put his hand
3 inside her pants and penetrated her vagina digitally. He never apologized to her or told
4 her he was scared. They took flowers out of the case, the money from the cash register,
5 and her purse.

6 Las Vegas Metropolitan Police Department ("LVMPD") Officer Dana DiPalma
7 testified that she responded to a daytime robbery call at the florist. (Exh. 10 at 17-27.)
8 She and other officers found the victim handcuffed, with tape over her mouth and
9 around her feet. Her pants were unbuttoned, and her undergarment showed. LVMPD
10 Detective Eric Stout testified that Kim later identified Turner and A.K. from separate
11 photo lineups. (Exh. 11 at 3-27.) LVMPD Detective Scott Kavon testified that Turner
12 was home when Kavon and other officers executed a search warrant where a credit
13 card in the name of the florist shop was found outside near the door of the residence.
14 (Exh. 10 at 130-137.)

15 Alquandre Turner testified that at the time of the incident he was unemployed
16 and looking for work. (Exh. 11 at 28-99.) A.K., whom he didn't know well, called him and
17 asked him if he wanted to make some money. Dudley happened to come out of his
18 next-door residence and ended up getting in A.K.'s Honda Civic with Turner and A.K.
19 They got on the freeway and Turner asked repeatedly where they were going. They
20 pulled into a shopping area with stores and restaurants. Turner thought A.K. wanted to
21 get something to eat at the Lao restaurant there. Instead A.K. pulled out a gun, pointed
22 it at Turner, and said, "okay, cuz, this is what we're going to do." (*Id.* at 40.) Turner was
23 shocked. One back seat was down, and you could reach into the trunk from the back
24 seat. A.K. told Dudley to turn around and retrieve some tape and handcuffs. Dudley
25 reluctantly complied; he tried to hand them to Turner. When Turner wouldn't take them,
26 he threw them on the floor between Turner's legs. Turner said, "I'm not doing nothin'."
27 A.K. told him, "You either do this or I'm going to do you." (*Id.* at 41.) Turner understood
28

1 A.K. to mean that he would shoot Turner if Turner didn't do as he was told. A.K. told
2 Dudley to remain in the car. They first entered a Sprint cellular store, but once inside
3 they could see that the store was only separated by glass from other stores inside the
4 building once you entered from the outside. They left. A.K. had the gun in his pocket
5 and was pointing it at Turner. A.K. spotted the florist; he made Turner go in first, then he
6 followed. A.K. was looking to see if there were surveillance cameras. Kim asked them if
7 they wanted to buy flowers. A.K. asked about prices. He said it was too expensive, and
8 they left.

9 A.K. drove around to the back of the shopping center. He showed Dudley the
10 back door of the florist and told him he had to park the car there so it would be there
11 when A.K. and Turner exited the store via the back. He drove back around to the front.
12 A.K. and Turner got out, Dudley drove away. They returned to the store; A.K. went
13 toward the back while Kim was asking Turner if he wanted to buy the flowers after all.
14 Turner turned around and started to head toward the front door to run out. A.K.
15 reappeared, brandishing the gun. He was pointing it in the direction of Kim and Turner.
16 A.K. told Kim to get down; she got down on her knees. Turner leaned over her and said,
17 "ma'am, please do not be scared, I'm scared too." (*Id.* at 52.) A.K. then told Kim to open
18 the register. She fumbled, then got the register opened; A.K. grabbed the cash. Kim
19 moved toward a corner and dropped to her knees. A.K. directed Turner to handcuff Kim.
20 The three went toward the back of the store to get Kim's purse. A.K. took her wallet,
21 phone, and keys. He told Turner to tape her ankles, so Turner taped her ankles loosely.
22 A.K. made Turner tape Kim's mouth too. They ducked out the back door and ran to the
23 car, which Dudley had parked there. Turner testified that he never touched Kim in a
24 sexual manner at all. The only time he touched her is when he gently put a hand on her
25 shoulder when he told her not to be scared. A.K. gave Dudley Kim's cell phone; he
26 offered some of the stolen money to Turner, but he refused to take it.
27
28

1 Turner was asked about the voluntary statement he gave to Detective Stout. The
2 statement reflected that he had initially told Stout that he was not the African American
3 man who went into the florist, but at trial Turner maintained that he never denied going
4 into the florist. The statement showed that Turner had told the detective that when A.K.
5 pulled up to his house and Turner got in the car, A.K. pulled out the gun. At trial Turner
6 insisted that he never saw the gun until they arrived at the shopping center. The
7 statement indicated that Turner had said it was a black, semiautomatic gun. At trial
8 Turner denied saying this because he said he knew nothing about guns and wouldn't
9 have been able to say whether it was a semiautomatic. The statement reflected that
10 Turner told Stout that A.K. forced him to participate, that he wanted no part of it, but his
11 life was being threatened. Stout had also testified that Turner told him during the
12 interview that he had not wanted to participate in the armed robbery with A.K. and that
13 he told Kim during the incident that he was scared too and that they would get through it
14 together. (Exh. 11 at 3-27.) Turner acknowledged that he never contacted police after
15 the incident. LVMPD crime scene investigator Jerry Autrey testified that no latent
16 fingerprints that matched Turner were found and that no DNA matching Turner was
17 recovered from the tape. Exh. 10 at 102-111.

18 **IV. Instant Petition**

19 **Sufficiency of the Evidence Claims**

20 **Ground 2**

21 Turner asserts that the State presented insufficient evidence to establish the use
22 of a gun. (ECF No. 38 at 33-36.) "The Constitution prohibits the criminal conviction of
23 any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*,
24 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)). On federal habeas
25 corpus review of a judgment of conviction pursuant to § 2254, the petitioner "is entitled
26 to habeas corpus relief if it is found that upon the record evidence adduced at the trial
27 no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at
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324. “[T]he standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.” *Id.* at 324 n.16. On habeas review, this court must assume that the trier of fact resolved any evidentiary conflicts in favor of the prosecution and must defer to such resolution. *Id.* at 326; *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). Generally, the credibility of witnesses is beyond the scope of a review of the sufficiency of the evidence. *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

The Nevada Supreme Court rejected this claim:

Appellant Alquandre Turner first contends that the sentencing enhancements for possession of a gun should not have been imposed. In particular, Turner argues that the State failed to prove that an actual gun was used in the commission of the crimes, and that even if the State proved the use of a gun, the State failed to prove that Turner was in possession of the gun. As to Turner’s first argument, our review of the record on appeal reveals sufficient evidence to establish the use of a gun beyond a reasonable doubt as determined by a rational trier of fact.[FN1] In particular, we note that the victim testified that Turner’s accomplice had a gun. Turner himself testified that his accomplice had a gun and Turner was afraid his accomplice would shoot him if he did not participate in the robbery.

The jury could reasonably infer from the evidence presented that the weapon used in the robbery was an actual firearm and not a toy gun. The jury’s verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[FN2]

Turning next to Turner’s second argument, the evidence adduced at trial showed that while the accomplice held the gun, Turner handcuffed the victim, ordered her to open the cash register, taped her nose, mouth, and ankles, and pushed her to the floor. “When one of two robbers holds a victim at bay with a gun and the other relieves the victim of his properties ... the unarmed offender benefits from the use of the other robber’s weapon, adopting derivatively its lethal potential.”[FN3] We conclude that in this case, there was sufficient evidence that Turner was in constructive possession of the gun, and the enhancements for possession of a firearm were properly applied.

[FN1: See *Wilkins v. State*, 96 Nev. 367, 609 P.2d 309 (1980); see also *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).]

1 [FN2: See *Bolden v. State*, 97 Nev. 71, 624 P.2d 20 (1981); see
2 also *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).]

3 [FN3: *Anderson v. State*, 95 Nev. 625, 630, 600 P.2d 241, 244
4 (1979).]

(Exh. 29 at 2-3.)

5 Dudley said that A.K. had a gun. Kim testified that A.K. had a gun during the
6 robbery. Turner himself testified that A.K. had a gun during the robbery and that he
7 complied with A.K.'s commands out of fear of being shot. Turner did testify that he didn't
8 know anything about guns, but there is no suggestion in the record that it was a toy gun
9 or anything other than an actual firearm. Turner has failed to demonstrate that the
10 Nevada Supreme Court's decision on federal ground 2 was contrary to, or involved an
11 unreasonable application of, clearly established U.S. Supreme Court law, or was based
12 on an unreasonable determination of the facts in light of the evidence presented in the
13 state court proceeding. 28 U.S.C. § 2254(d). Habeas relief on ground 2 is, therefore,
14 denied.

15 **Grounds 4 and 6**

16 Turner contends in ground 4 that insufficient evidence supported his conviction of
17 conspiracy to commit robbery. (ECF No. 38 at 38-42.) He also argues in ground 6 that
18 insufficient evidence supported the sexual assault conviction. (*Id.* at 44-45.)

19 The Nevada Supreme Court considered and rejected these two claims together:

20
21 Turner also contends that the evidence presented at trial was
22 insufficient to support the jury's finding of guilt regarding the charges of
23 conspiracy and sexual assault. Our review of the record on appeal,
24 however, reveals sufficient evidence as to those charges to establish guilt
25 beyond a reasonable doubt as determined by a rational trier of fact.[FN9]

26 In particular, we note that the victim testified that Turner actively
27 participated in the robbery without any instruction or guidance from his
28 accomplice. Although Turner testified that he was forced to participate in
the robbery by the accomplice, Turner did not subsequently report the
crimes to police, and the victim's credit card was found at Turner's
residence. Further, the victim testified that during the robbery, Turner
placed his hand down the front of her pants and digitally penetrated her
vagina.

1
2 The jury could reasonably infer from the evidence presented that
3 Turner conspired to commit the robbery and sexually assaulted the victim.
4 It is for the jury to determine the weight and credibility to give conflicting
5 testimony, and the jury's verdict will not be disturbed on appeal where, as
6 here, substantial evidence supports the verdict.[FN10]

7 [FN9: See *Wilkins*, 96 Nev. 367, 609 P.2d 309; see also *Origel-*
8 *Candido*, 114 Nev. at 381, 956 P.2d at 1380.]

9 [FN10: See *Bolden*, 97 Nev. 71, 624 P.2d 20; see also *McNair*, 108
10 Nev. at 56, 825 P.2d at 573.]

11 (Exh. 29 at 5.)

12 Turner testified that A.K. forced him to participate in the robbery. He also testified
13 that he never touched the victim in a sexual manner. But the victim testified that Turner
14 freely participated in the robbery and testified in detail as to how he sexually assaulted
15 her. Turner's recorded statement to police was at times inconsistent with his trial
16 testimony. Even within the statement, the detective asked him about changes in
17 Turner's version of events as the interview unfolded. Turner never contacted police and
18 Kim's credit card was found in his yard. The jury weighed the conflicting testimony.
19 Substantial evidence supports the verdict. Turner has not shown that the Nevada
20 Supreme Court's decision on federal grounds 4 and 6 were contrary to, or involved an
21 unreasonable application of, clearly established U.S. Supreme Court law, or were based
22 on an unreasonable determination of the facts in light of the evidence presented in the
23 state court proceeding. 28 U.S.C. § 2254(d). Thus, the court denies habeas relief on
24 grounds 4 and 6.

25 **Deadly Weapon Enhancements**

26 **Ground 3**

27 Turner asserts that his sentences for the deadly weapon enhancements violated
28 his Eighth Amendment right to be free from cruel and unusual punishment. (ECF No. 38
at 37-38.) Nev. Rev. Stat. § 193.165 provides for additional penalties where a crime is
committed while in possession or constructive possession of or with use of a deadly

1 weapon. Turner received consecutive equal sentences on the kidnapping, robbery, and
2 sexual assault charges under § 193.165(1).

3 The Eighth Amendment to the United States Constitution provides that
4 “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and
5 unusual punishments inflicted.” U.S. Const., Amend. VIII. “The concept of proportionality
6 is central” to sentence reviews under the Eighth Amendment. *Graham v. Fl.*, 560 U.S.
7 48, 59 (2011). Thus, the Eighth Amendment bars not only “barbaric punishments” but
8 also any “extreme sentences that are ‘grossly disproportionate’ to the crime.” *Ewing v.*
9 *Cal.*, 538 U.S. 11, 23 (2003) (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S.
10 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).
11 While Eighth Amendment jurisprudence is murky, “one governing legal principle
12 emerges as ‘clearly established’ under § 2254(d)(1): A gross disproportionality principle
13 is applicable to sentences for terms of years.” *Lockyer v. Andrade*, 538 U.S. 63, 72
14 (2003) (finding that the “precise contours of [a gross disproportionality principle] are
15 unclear and only applicable in the ‘exceedingly rare’ and ‘extreme’ cases”) (quoting
16 *Harmelin*, 501 U.S. at 1001 (Kennedy, J.)); see *Norris v. Morgan*, 622 F.3d 1276, 1286
17 (9th Cir. 2010) (surveying the “disarray” of Supreme Court jurisprudence on the
18 disproportionality principle that culminated in *Andrade*).

19 “A court’s proportionality analysis under the Eighth Amendment should be guided
20 by objective criteria.” *Solem v. Helm*, 463 U.S. 277, 292 (1983). The “approach for
21 determining whether a sentence for a term of years is grossly disproportionate for a
22 particular defendant’s crime” requires “comparing the gravity of the offense and the
23 severity of the sentence.” *Graham*, 560 U.S. at 60. If this comparison “leads to an
24 inference of gross disproportionality,” the court is then permitted to “compare sentences
25 imposed on other criminals in the same jurisdiction” as well as “the sentences imposed
26 for commission of the same crime in other jurisdictions,” but it is not required to do so.
27 *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J.). Reviewing courts should grant substantial
28

1 deference to the broad authority that legislatures necessarily possess in determining the
 2 types and limits of punishments for crimes. *Solem*, 463 U.S. at 290 (citations and
 3 internal quotations omitted). See *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)
 4 (“The more general the rule, the more leeway courts have in reaching outcomes in
 5 case-by-case determinations.”).

6 The Nevada Supreme Court held that the enhancements here did not violate the
 7 Eighth Amendment:

8
 9 The Eighth Amendment does not require strict proportionality
 10 between crime and sentence, but forbids only an extreme sentence that is
 11 grossly disproportionate to the crime.[FN4] Regardless of its severity, a
 12 sentence that is within the statutory limits is not “cruel and unusual
 punishment unless the statute fixing punishment is unconstitutional or the
 sentence is so unreasonably disproportionate to the offense as to shock
 the conscience.”[FN5]

13 This court has consistently afforded the district court wide discretion
 14 in its sentencing decision.[FN6] This court will refrain from interfering with
 15 the sentence imposed “[s]o long as the record does not demonstrate
 16 prejudice resulting from consideration of information or accusations
 founded on facts supported only by impalpable or highly suspect
 evidence.”[FN7]

17 In the instant case, appellant does not allege that the district court
 18 relied on impalpable or highly suspect evidence or that the relevant
 19 statutes are unconstitutional. Further, we note that the sentence imposed
 20 was within the parameters provided by the relevant statutes.[FN8]
 Accordingly, we conclude that the sentence imposed does not constitute
 cruel and unusual punishment.

21 [FN4: *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality
 22 opinion).]

23 [FN5: *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996)
 24 (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-
 25 22 (1979)); see also *Glegola v. State*, 110 Nev. 344, 348, 871 P.2d
 950, 953 (1994).]

26 [FN6: See *Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987).]

27 [FN7: *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).]

28 [FN8: See NRS 193.165; NRS 200.380; NRS 200.366; NRS
 205.060 (4).]

1 (Exh. 29 at 3-4.)

2 Respondents argue that Turner's sentences are all within the statutory
3 parameters of Nevada law. (ECF No. 54 at 17, citing Nev. Rev. Stat. §§ 193.165,
4 200.320, 200.380, 200.366.) Turner essentially argues that the deadly weapon
5 enhancements are unduly harsh. He points out that Dudley, the victim, and Turner all
6 testified that Turner did not have the gun. But Turner fails to show the applicable
7 statutes are unconstitutional or that the trial court abused its discretion in sentencing
8 him. Further, he fails to show that the deadly weapon enhancements are grossly
9 disproportionate to the crimes. The evidence adduced at trial was that Turner
10 handcuffed the florist, taped her mouth shut, robbed her and her store and sexually
11 assaulted her. A.K. brandished a gun throughout the robbery. A harsh sentence, without
12 more, does not violate the Eighth Amendment. The Nevada Supreme Court's decision
13 on the deadly weapon enhancements was not contrary to, or an unreasonable
14 application of, clearly established U.S. Supreme Court law, nor was it based on an
15 unreasonable determination of the facts in light of the evidence presented in the state
16 court proceeding. 28 U.S.C. § 2254(d). The court, accordingly, denies habeas relief on
17 ground 3.

18 **911 Audio Recording**

19 **Ground 5**

20 Turner argues that the State violated his due process rights by failing to produce
21 discovery in a timely manner. (ECF No. 38 at 42-44.) He asserts that the State failed to
22 provide him with the audio recording of the 911 call and only gave him the transcript the
23 week prior to trial.

24 Turner is apparently claiming that the State withheld favorable evidence. The
25 suppression by the prosecution of evidence favorable to an accused violates due
26 process where the evidence is material either to guilt or to punishment, whether or not
27 the prosecution acted in bad faith. *Brady v. Maryland* 373 U.S. 83, 87 (1963). In
28

1 *Strickler v. Greene*, the Court set out the three elements of a *Brady* prosecutorial
2 misconduct claim: “The evidence at issue must be favorable to the accused, either
3 because it is exculpatory, or because it is impeaching; that evidence must have been
4 suppressed by the State, either willfully or inadvertently; and prejudice must have
5 ensued.” 527 U.S. 263, 281–282 (1999).

6 Kim testified at trial that she had listened to her call to 911 with prosecutors the
7 week before the trial, and it accurately depicted what she told the dispatcher. (Exh. 10
8 at 66-77.) The State moved to admit the recording; the defense objected because the
9 State had never provided the recording to the defense. The defense only received the
10 transcript of Turner’s statement to the police the week before the trial. The court
11 admitted the recording over objection.

12 The Nevada Supreme Court pointed out that Turner conceded on direct appeal
13 that the tape was not prejudicial:

14
15 Finally, Turner contends that the district court erred by admitting the
16 recording of the 911 call made by the victim after the robbery. Turner argues
17 that his due process rights were violated because he was never actually
provided with a copy of the tape, and although he received a transcript of
the tape, the State did not provide the transcript until a week before trial.

18 In his opening brief, Turner concedes that the tape was not
19 prejudicial, and even informs this court that “the point here is not to seriously
20 suggest this case should be overturned based on admission of the 9-1-1
21 tape which if anything was helpful to Turner.” Under these circumstances,
22 this court declines to review the discovery policies of the Clark County
District Attorney. Where Turner concedes that he has suffered no prejudice,
such a review would amount to an advisory opinion.[FN11] Turner’s
argument that his due process rights were violated is without merit.

23 [FN11: See *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d
24 1110, 1110 (1981) (holding that this court will not render advisory opinions
on abstract questions); see also Nev. Const. art. 6, § 4.]

25 (Exh. 29 at 5-6.)

26 Turner argues here that because he did not receive the recording before trial “he
27 could not have prepared properly for trial.” (ECF No. 38 at 42.) This bare assertion fails
28 to demonstrate that Turner was prejudiced. The court notes that on cross-examination

1 of Kim, Kim acknowledged that she did not tell the 911 operator that she had been
2 sexually assaulted. (Exh. 26 at 92-93.) In fact, Turner acknowledged on direct appeal
3 that the tape “was not particularly prejudicial,” and conceded that the recording if
4 anything was helpful to his defense. (Exh. 26 at 24-25.)

5 Turner simply has not shown that the Nevada Supreme Court’s decision
6 regarding the allegedly late production of the 911 recording was contrary to, or an
7 unreasonable application of, clearly established U.S. Supreme Court law, or was based
8 on an unreasonable determination of the facts in light of the evidence presented in the
9 state court proceeding. 28 U.S.C. § 2254(d). Habeas relief is denied as to ground 5.

10 The petition, therefore, is denied in its entirety.

11 **V. Certificate of Appealability**

12 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
13 Governing Section 2254 Cases requires this court to issue or deny a certificate of
14 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within
15 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
16 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

17 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
18 “has made a substantial showing of the denial of a constitutional right.” With respect to
19 claims rejected on the merits, a petitioner “must demonstrate that reasonable jurists
20 would find the district court’s assessment of the constitutional claims debatable or
21 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
22 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
23 jurists could debate (1) whether the petition states a valid claim of the denial of a
24 constitutional right and (2) whether the court’s procedural ruling was correct. *Id.*

25 Having reviewed its determinations and rulings in adjudicating Turner’s petition,
26 the court finds that none of those rulings meets the *Slack* standard. The court therefore
27 declines to issue a certificate of appealability for its resolution of any of Turner claims.
28

VI. Conclusion


IT IS THEREFORE ORDERED that the **petition (ECF No. 38) is DENIED.**

IT IS FURTHER ORDERED that a certificate of appealability will not issue.

The Clerk of the Court is directed to:

- substitute Nethanjah Breitenbach for Respondent Renee Baker
- enter judgment accordingly and close this case.

DATED: 26 August 2024.



HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE